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IN THE

Supreme Court of the United States

_____ TERM, 1965.

NO. 279

CHARLES H. BLANCHARD d/b/a BLANCHARD CONSTRUCTION COMPANY,

Petitioner,

VERSUS

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Respondent.

REPLY BRIEF OF RESPONDENT TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

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INDEX.

	Page
STATEMENT OF THE CASE	1
QUESTIONS PRESENTED	2
ARGUMENT	3
CONCLUSION	4

AUTHORITIES.

Page

Cases:

Blanchard v. St. Paul Fire and Marine Insurance Company, (5th Cir., 1965), 341 Fed 2d 351 . . . . . 1, 3

Miscellaneous:

Federal Rule of Civil Procedure 60 (b) (4), (5) and (6) 3

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CHARLES H. BLANCHARD d/b/a BLANCHARD CONSTRUCTION COMPANY,

Petitioner,

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ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Respondent.

REPLY BRIEF OF RESPONDENT TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

STATEMENT OF THE CASE.

It is respectfully submitted that the statement of case contained in the decision of the U. S. Circuit Court, Fifth Circuit, appearing at 341 Fed 2d 351 is

accurate statement of all of the happening of events which give rise to this petition. The one point that petitioner fails to include in his statement which is one of the basis of the opinion of the Lower Court, is the fact that the litigation involved in this case rises in the following manner:

1. Petitioner after being declared in default on his contract filed suit against the respondent asking for an accounting. The respondent replied with the accounting and at the same time filed a counter-claim on an indemnity agreement then existing between the petitioner and the respondent. Trial was had on the suit in accounting and on the counter-claim of the respondent on the indemnity agreement and resulted in a verdict against the petitioner on the suit in accounting and a money verdict in favor of the respondent on the counter-claim.

QUESTIONS PRESENTED.

Petitioner fails to set out the actual question presented to the Lower Court and Circuit Court of Appeal, namely:

1. Where the petitioner was placed in default by the government and the respondent by the provisions of its bond was required to take over and complete the construction and where the petitioner instituted an action for accounting and the respondent accounted to the petitioner and filed its counter-claim on the basis of the indemnity agreement between the parties and

a money judgment was awarded to the respondent on the basis of the counter-claim and the petitioner had proceeded before the Armed Services Board of Contract Appeals for wrong determination and the respondent could not and was not party to such proceeding, and the question of accounting and the indemnity agreement was not a proper subject to be determined by the Armed Services Board of Contract Appeals, was the decision of the Armed Services Board of Contract Appeals a quasi judicial decision or in fact a judicial determination between the parties whereby relief should be granted under Federal Rules Civil Procedure 60 (b).

ARGUMENT

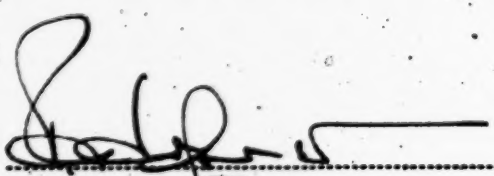
The question herein presented was answered in the negative by the Circuit Court of Appeal and by the Lower Court. At page 356 of the Circuit Court of Appeal's decision, Blanchard v. St. Paul Fire and Marine Insurance Company, (5th Cir., 1965), 341 Fed 2d 351 the Court states that the petitioner alone had the remedy against the United States for wrongful determination in the administrative proceeding, and it is not conceivable that the respondent could be a party to that proceeding and could be greatly prejudice should the petitioner eventually recover against the United States and should the respondent fail to prevail in 60(b) Federal Rules of Civil Procedure.

It is respectfully submitted that relief under Rule 60(b) provides that the Court may grant relief where the Court determines that final judgment is not legally

equitable for any other reason justifiable relief of operation of the judgment thus giving the Lower Court discretionary power to grant such relief where the facts warrant such relief. In the instant case the Lower Court denied such relief to the petitioner and the Circuit Court of Appeal approved the Lower Court's decision which sustained the fact that the Lower Court had not abused its discretionary powers.

CONCLUSION

It is respectfully submitted that based on the facts as presented to the Lower Court and the Circuit Court of Appeal this Petition for Writ of Certiorari should be denied.



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I HEREBY CERTIFY that copy of the above and foregoing Reply Brief of Respondent to Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, has been furnished George E. Morse, Esquire of Morse and Morse, Hatten Building, Gulfport, Mississippi, this 16th day of July, 1965, BY MAIL, postage prepaid.

RAYMOND A. HEPNER